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FEDERAL CORPORATION TAX APPLICABLE TO NEW YORK JOINT-STOCK ASSOCIATIONS.

In Eliot v. Freeman, 220 U. S. 178, 55 L. ed. 424, it was held, that, as Congress intended that "only such corporations and joint-stock associations as are organized under some statute or derive from that source some quality or benefit not existing at the common law," a real estate trust and a department store trust, each with transferable shares representing interests in these trusts, and both trusts arising out of common law agreements and in no sense owing their existence or any facility they exercise to statutory power, were not taxable under the federal corporation tax law.

It was said: "The two cases under consideration embrace trusts which do not derive any benefit from and are not organized under the statutory laws of Massachusetts. Joint-stock companies of the statutory character are not known to the laws of that commonwealth."

Roberts v. Anderson, 226 Fed. 7, decided by Second Circuit Court of Appeals, considers the question whether a joint stock association, which by New York law was allowed to sue and be sued in the name of its president or treasurer, derived such benefit from New York statute as made it subject to the federal tax on corporations.

This court said: "The statutes of the State of New York have endowed the United States Express Company with capacities and attributes not possessed by a partnership at common law. They have legalized attributes assumed by the United States Express Company and made valid and effective its asserted rights. The New York Act of 1849, authorizing joint-stock companies to sue and be sued in the name of the president or treasurer of the company, was followed by Chapter 153 of the Laws of 1853, amending the former act so as to provide that suits against a joint-stock company should in the first instance be prosecuted against the president or treasurer of the company, and that suits could only be brought against individual shareholders until judgment against the company was returned unsatisfied."

Whether New York law impliedly forbids the creation of a trust for the carrying on of business, wherein interests of *cestuis que trustent* are represented by transferable shares, was not passed upon by Second Circuit Court of Appeals. It was considered that the joint stock company, whose interests were involved, was "in the enjoyment of valuable privileges which such a company did not possess at common law, but obtains by virtue of the statutes of New York."

The only so-called privilege this company possessed, that a trust with transferable shares did not, was that it might sue and be sued by its president or treasurer, instead of by its trustees. So far as exempting individual shareholders from suit until a judgment rendered therein against the president or treasurer is concerned, was returned unsatisfied, this puts upon such shareholders an ultimate liability, when in a trust of the above nature, there would be no liability upon individual shareholders, either primary or secondary.

Long ago it was held by U. S. Supreme Court that a trustee is not an agent, but is a principal. Taylor v. Davis, 110 U. S. 330, 28 L. ed. 163. He adopts the same risks and liabilities as persons who trade on their own account, and his personal liability is stringent. Sears on Trust Estates as Business Companies, §§ 28, 68.

In active trusts, it has been said that "a trust estate cannot promise" and therefore creditors must "look solely to the trust estate." Ibid Chapter X, where many authorities both American and English are cited.

The close bearing of the ruling by the Court of Appeals, that this New York joint-

stock association was liable for the corporation tax, is shown as follows: "In Spraker v. Platt, 143 N. Y. Supp. 440, 158 App. Div. 377, 386, the Appellate Division of the Supreme Court of New York, it is declared that the United States Express Company is the creature of contract and exists by virtue of its articles of association and not by statute, and that joint-stock associations are not of statutory origin, but the creatures of common law. We admit that this company did not organize under a statute and that the common law permits the organization of joint-stock companies. We do not, however, understand that the court in that case meant to decide that the company derived no advantage from any statute of the state and possessed no rights under its articles, except such as the common law gave it. And it could not so have decided without overruling the Court of Appeals of the state."

The reference here was to a case where a statute imposed a tax on "every corporation, joint-stock company or association whatever," incorporated or organized under any law of this state. Platt v. Wemple, 117 N. Y. 136, 6 L. R. A. 303. But it was said: "The (joint-stock) company has the characteristics of a corporation, and so far as it can, it assumes to itself an independent personality, and asserts powers and claims privileges not possessed by individuals or partnerships. It is precisely such an association as, when formed without authority of Parliament was declared in England to be illegal and void and to be 'deemed a public nuisance.' * * * It is not necessary, however, to assert in what cases such a combination of individuals would now be deemed illegal at common law for the statutes of the state render the arrangement possible, and in our opinion the association is within their purview."

In other words, the court assumed, though the articles may not have so stated, that statutes would automatically cover the organization of a trust with transferable shares. This case merely dodged the necessity of passing upon the validity of extra-statutory organization, but Federal Court of Appeals admits that "the legality at common law of such companies may be considered as finally established." With this concession it seems some stretch of assumption by the New York court to say that an organization valid at common law and not condemned by statute, should be covered by statute, when it professes in no way to come thereunder.

In conclusion, allow us to say that the New York statute rather prescribes a form than grants a privilege. Expressly it does not deny to a creditor the right to sue trustees of a trust with whom he contracts as individuals, and certainly if the president or treasurer sued without their consent the action could not be maintained. And suppose there were only one trustee and no president or treasurer?

NOTES OF IMPORTANT DECISIONS.

COURTS—PRINCIPLE OF EQUITY DISTINGUISHED FROM RULE OF PROPERTY.—Ninth Circuit Court of Appeals holds that California decision establishing unqualifiedly the doctrine that partnership property continues to be bound for partnership debts after the sale by one partner to the other, establishes a principle of equity only, and does not lay down a rule of property and therefore a federal court sitting in bankruptcy is not bound thereby. Rapple v. Dutton, 226 Fed. 430.

The Court of Appeals says: "The contention of the petitioner that the rule established by Conroy v. Woods, 13 Cal. 226, 73 Am. Dec. 605, is binding upon the federal court in bankruptcy, because it is a rule of property for the State of California, is without merit. That decision involves no construction of a state statute, nor does it establish a rule of property, but it decides a principle of equity only and it is not binding on a federal court. * * * This rule is especialy applicable to questions of equity law, as to which federal and state courts appeal to the same sources of information. * * * In John Deere Plow Co. v. McDavid, 137 Fed. 802, 70 C. C. A. 422, it was held that whether a creditor of a bankrupt is entitled to a preference on the ground that the claim is based on the bankrupt's misappropriation of a trust fund does not depend on the con-

struction of the contract between the parties, but on a rule of preference in equity as to which federal decisions, and not those of the state, must entail." We give the court's reasons in full, though we do not perceive the close aptness of the last sentence.

A number of cases and text-books are cited as showing that: "The rule deducible from these authorities is that when a member of a solvent co-partnership sells in good faith his interest to his co-partner and the latter assumes the payment of the debts, the retiring partner loses his equitable right to require that the partnership assets be applied to the payment of his partnership debts."

The case here was insistence by a former partner that the assets of a partnership which had been sold in good faith and while solvent, should be subjected to the claim of a judgment creditor, notwithstanding that they had been transferred to a corporation, the assets of which were being administered in bankruptcy. How then may it be said and when, the assets of a partnership get away from the right of the creditor of a partnership to subject same? And if a judgment for his debt carries a lien, when and how is that displaced? If it is held to remain or disappear, is not a decision to that effect a rule of property and not a principle of equity? May the rule arise out of construction of statute itself? In the latter case, surely a federal court would be bound, as the court appears to admit. But, why, after all, should a principle of equity which has such a very close approximation to a rule of property be distinguished from a rule of property? Is it a refinement amounting to technicality to differentiate the two at all? It is not necessary for the proper working of the bankruptcy statute, for that accommodates itself to varying laws of different states as to liens, exemptions, etc.

BIGAMY—HONEST BELIEF IN NON-EXISTENCE OF FORMER MARRIAGE REALLY UNDISSOLVED.—In Texas Court of Criminal Appeals it was held that honest belief that one has been divorced, makes remarriage not unlawful. Chapman v. State, 179 S. W. 570.

This as a general principle seems very doubtful, because it has been ruled over and again that the only intent in entering into the second marriage was the becoming married. Therefore it has been held that good faith in the contracting of a second marriage, where one was advised by counsel that a former marriage was not merely voidable, but was absolutely void, was no defense. Staley v. State, (Neb.) 1028, 34 L. R. A. (N. S.) 613. But it might be said that this would be a mistake of law and no one is excused for that. A mistake of fact does not gainsay knowledge of law.

It is to be admitted, however, there is diversity of view, both in English and American cases, upon the question of honest belief in death or divorce of the former spouse, making a subsequent marriage bigamous. Of American cases holding such belief is not of itself a defense are Jones v. State, 67 Ala. 84; Com. v. Hayden, 163 Mass. 453, 47 Am. St. Rep. 468; Davis v. Com., 13 Bush. (Ky.) 318; State v. Armington, 25 Minn. 29. And even in states holding that honest belief suffices as a defense it must be shown that the one alleging good faith did not act without proper care in the ascertaining of the death or divorce of the former spouse. Watson v. State, 13 Tex. App. 76; Reg. v. Smith, 14 U. C. B. 565; Squire v. State, 46 Ind. 459.

It is to be noted that the Chapman case does not lay any stress on the necessity of a showing by defendant of his making diligent inquiry as to the truth of the report that his former wife had been divorced. He was refused a continuance to obtain his former wife's testimony, when he did not show that he was unable to obtain documentary or judicial evidence that the divorce had been granted. There was reversal for not granting the continuance.

REWARD—POSSE KILLING MURDERERS IN ATTEMPTING ARREST.—Proclamation under a statute was made by the Governor of Nevada in offering a reward "for the arrest and conviction of the person or persons guilty of the murder of Henry Cambron and three associates," but "there was neither arrest nor conviction for the reason that the persons 'guilty of the murder' were all killed while resisting arrest." Plaintiffs constituting a posse in attempting to make the arrest sued for the reward and recovered judgment in the trial court, and this was affirmed by the Nevada Supreme Court. Smith v. State, 151 Pac. 512.

The court says there is no parallel in reported cases for the fact on which the claim for reward rests, but it thinks there is precedent for the rule on which the claim is based.

There are then cited authorities that offers of rewards should not receive a technical construction (See 46 L. R. A. (N. S.) 664.) It was argued that opportunity to prove the guilt of

the murderers so as to secure their conviction was prevented by their illegal resistance making justifiable their being killed. This, said the court "operated as a lawful excuse for non-compliance with the full conditions of the reward."

We think this conclusion was right, but the proof should show guilt beyond a reasonable doubt, as would have been demanded in a trial, and further that the killing could not have been reasonably avoided. Furthermore, every possibility of defense ought to be excluded were the alleged murderers to be brought to trial. The judgment such as was rendered ought not to open the way for a preferential killing by a posse or officer seeking the arrest of one for whose arrest and conviction a reward has been offered. On the other hand it may be argued that the more desperate murderers, the more likely will they resist arrest and the more is the necessity for offering a substantial reward.

PROFESSOR WIGMORE'S SCIENCE OF JUDICIAL PROOF.

Although Professor Wigmore's "Principles of Judicial Proof" was put forth by its author as a "tentative attempt to call attention to the principles of judicial proof," and criticism of the success of this attempt was invited, little has been published in the way of serious discussion of the thesis of this remarkable work.

The function of the court (or the jury) in finding facts as a preliminary to a judgment of law is one not merely of the observation or deduction necessary to conclusive proof, but is also one of the measurement of probabilities. The operation of appraising the probabilities of the principles of a mass of evidence and co-ordinating the results into a harmonious synthesis the degree of probability of which shall be determinable is an operation of tremendous complexity and nicety. Professor Wigmore's project of a chart to exhibit the articulation of a mass of evidence is not practical, for the articulation of the evidence is less important than the measurement of its collective probative effect. The emphasis of the scheme is in the wrong place; it is on the articulation of evidential particles rather than on the measurement of probabilities. The notation betrays the same one-sidedness. The notation, if such a thing were feasible, would have to be enlarged so as to furnish an apparatus for grading probabilities and stating the final result in more definite and nearly exact form. But such a thing is not feasible.

Herein, also, lies the difficulty of the general project, for the more scientific the analysis is made, the more it concerns itself with the essential object of measuring probabilities, the wider scope is necessarily given to conjecture, and the less likely the analysis is to express a common judgment rather than the judgment of a particular mind. By avoiding the measurement of probabilities, except in loose and vague terms, it is, of course, possible to concentrate attention on the articulation of the evidence and largely to overcome the evil of subjective variation. But when something more serious and more useful is attempted, the subjective element becomes more prominent. For probability is a subtle thing the degree of which depends upon a limitless variety of co-operating intellectual factors, and an authoritative formulation of the grade of probability acceptable to all intelligent minds is unattainable.

If for the sake of the argument we waive these objections, the idea of charting the evidence in order to unite its innumerable threads in a single strand and to present all parts of it to the attention simultaneously, is a good one. The objection may be made that the mind can cover the same ground discursively equally well. It remains true, however, that when the mind works discursively, though it may exercise a high degree of patience and may shrink from no aridity, it necessarily experiences some distaste for a hard-and-fast mechanical logic; consequently, while it may be possible for the discourse to be as exhaustive and as meticulous as the chart, the chart itself provides a standard with respect

to which the mind will feel the need of better work in its discursive recapitulation than if it had no such standard in mind as a criterion of skillful analysis.

With regard to the further possible objection that every symbol in the chart implies a discursive operation, and therefore is a duplicate of mental processes, it does not follow that the chart is for that reason superfluous and time-wasting. On the contrary, the symbols may possibly be mastered so that the use of the notation will become an easy and almost mechanical operation, and in reviewing complicated masses of evidence, for which the chart should be, of course, useful, there is the possibility that in skilled hands it may become an actual time-saver, owing to the difficulty of applying the discursive method without great awkwardness in such cases.

If probability measurement were not of essential importance, there would be no weakness in the principle of such a scheme as Professor Wigmore's. However, the fault of the traditional system of legal proof, so-called, is that the line between proof and probability has not been drawn with sufficient clearness. Certain stereotyped conceptions need to be got rid of, so that the process technically known as legal proof may become a process of accurate fact-determination and probability measurement. Clumsy and ineffective formulae of the traditional system, such as "moral certainty," for example, need to be superseded. The Wigmore scheme is thus inadequate, and there is no way of amending it to overcome its defects, or of substituting for it a more satisfactory scheme. Other reforms of the criminal trial system than this, which Dean Wigmore thinks are too far off in the future to merit serious consideration at this time, after all deserve to be treated as far more practical.

In our criminal procedure, fiction and technicalities need to be excluded from the process of formulating the case. The intrusion of logical error must be repulsed. It was characteristic of the earlier and simpler stages of criminal law that they did not scrutinize their logical processes, and that they applied principles grounded in self-deception. The criminal law felt impelled to assume the existence of proof where there was, properly speaking, no proof. A "moral" certainty in the minds of the jurors was treated as of the same effect as a logical certainty. Fictions like these are based on considerations of public expediency which do not exist in the same shape as years ago, when the psychology of the criminal was less clearly understood and the means for discovering his danger to society were more meager.

Proof, or more accurately Elucidation, is a process too complicated to conform to the simple standards of traditional logic which Dean Wigmore evidently has in mind. The technic of judicial elucidation aims not at the attainment of positive objective truth, but more properly at the realization of a certain standard, which might be defined as the standard of Acceptable Validity.

The standard of Acceptable Validity in the Anglo-Saxon period was very different from that of to-day. When such expedients as wager of battle and trial by ordeal could be deemed adequate instruments for its realization Acceptable Validity could not be a logical conception. When trial by jury was instituted as a common procedure it became impressed with the quality of a rough logic. The scholastic synthesis further modified its character by applying dialectical methods of demonstration which achieved something very unlike pure logical proof. Later faulty methods of empirical induction made of Acceptable Validity something falling short of complete verification. In our own day it is doubtful whether surviving crudities do not prevent thorough intellectualization of the concept of Acceptable Validity, through the confusion of "moral" with logical certainty.

It is wrong, therefore, to apply solely an intellectual test to the standard of Acceptable Validity. As the resources of positive proof multiply, as they are bound

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to do in an intellectually advancing culture, the standard of Acceptable Validity likewise advances.

The science of logic has in the main been based upon the underlying principle of certainty. It is hard to see why uncertainty should not be included likewise in the province of logic, and why there should not be a doctrine of probabilities in place of the loose empirical test of probability. Such a doctrine would systematize the technic of judgment and give it a less arbitrary character. It would then be possible to bring to bear a more efficient critical apparatus upon the analytical study of this art of judicial elucidation treated by Professor Wigmore as one of "judicial proof."

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Brookline, Mass.

RIGHT OF ACTION—EXPRESSING SUBSTANTIVE RIGHTS IN TERMS OF REMEDIES.

It will always be unfortunate for a system of law, to express substantive rights in the terms of remedies. Our law has for centuries suffered from this mistake, probably more than from any other cause. This habit becomes especially unfortunate, when the expression used is as inadequate as the one employed as the title of this article.

A right of action is a right every living soul has against every other living soul, yes, even against all dead persons. If it were not a physical impossibility to accomplish it, I, or any other person, might to-day, or any other day, in the Court of Common Pleas of Philadelphia, or in any other court, commence actions against the rest of mankind, living and dead; nothing in the law could prevent us from doing so. The courts are always open to all suitors, and will set their machinery in motion upon the application of any person using the proper form and paying the required fee. If, at the end of the suit, it is found that it was brought wantonly, the suitor will be mulcted in costs, and he may in certain cases lay himself open to criminal prosecution, but his right to commence the action can not, and will not, be denied.

Of course, when the expression, "right of action," is used, thereby is not meant what it says, namely, the mere naked right to go into court and sue the world and his uncle; it is intended thereby to express, that the suitor has a substantial right which he may enforce by an action at law. But by laying the emphasis upon the remedial side of the right, all sorts of inaccurate statements and rules are propagated. We have translated prescription of claims into limitation of actions; while there is no real limitation of actions, as I have as perfect a right to sue on a prescribed claim as on a valid one, still, the use of the term, "limitation of action," has perverted the whole idea of prescription, and has engendered the theory of laches, unknown in any other system of law, and than which probably nothing more arbitrary could be invented; it makes the rights of a man rest in the lap of the gods, that is, in the sound discretion and conscience of the judge before whom his case happens to be tried. Suppose this judge has no sound discretion, or conscience? This translation of substantive rights into the terms of remedies is bound to make mischief wherever it appears, because it at once divests the right of its substantive character, and leaves nothing but the right to invoke the remedy, a right possessed by every man, whether he has any substantive right or not. In considering some of the bad effects of this translation, the writer desires to use a concrete example, and shall for his subject take the article on the Nature of Ownership, by the late Professor Ames (Select Essays, &c., III, p. 561; Lectures on Legal History, p. 192).

The learned author commences by saying that where an owner has been wrongfully disseised, the disseisor has the res, while the disseisee retains the mere right to recover the res. Or, as Brian, C. J., put it, the one had the property, the other only the right of

property. It seems singularly inept to use this *bon mot* or epigram of Brian, C. J., as an occasion for complimenting him for sagaciousness, since the statement is extremely misleading. The statement is a play on words, founded on the two meanings of the word property. Of course, the disseisor has the property (the physical thing) and the disseisee the right of property (the proprietas, the ownership). But, the learned author continues, the disseisor was said to have the property (meaning proprietas) for various reasons, all of which have nothing to do with property in the meaning of ownership, but simply result from his actual possession. While the disseisor's possession was precarious, that of the disseisee was still worse, as he could neither use the property, nor sell his right to it, as it was a chose in action, and as such not transferable at common law.

This is true, but it is true only because English law had adopted the right of action view of substantive rights. If such a view had not been adopted, it would never have struck anybody (at least not at the time when the theory was born) that the owner of a cow ceased to be the owner thereof, because another man drove it into his flock.

But the author is not satisfied in stating this peculiarity of English law. He proposes to show that there is no peculiarity; that the doctrine is founded in the nature of things. In order to do this, he proceeds to analyze the idea of "ownership" or "property," and comes to the conclusion that the landlord, bailor, loser or disseisee can be called true owners only by the use of inaccurate or elliptical language, because they do not have the present enjoyment, or power of enjoyment. It is rather difficult to see how the owner, collecting rents from a ten-story apartment house has less present enjoyment thereof, than if he were to occupy the whole thereof all by himself, or how the bailor has less present enjoyment of his bond, if he cuts the coupons in the district attorney's office, than if he does it in the vault of his bank.

But the whole of the author's dissertation upon this point appears to rest on the old confusion between *dominium* and *proprietas*. When the first is, what is called *dominium plenum*, it must necessarily be founded on *proprietas*. But *dominium* may be *divisum*. One may have *dominium fundi;* another *dominium fructus;* and there may be many other *jura dominii specialia* existing at the same time. The owner of any dominant property has *dominium speciale* over the servient property to the extent of his easement; but he is in no sense the owner thereof, or of any part thereof.

In the further development of his theory, the author, to some extent, mixes possession with right of possession, and as to the latter, the "right of action" view again comes forward. The occupier of *res nullius*, the successor without title of the tenant *pour autre vie*, yes, even the grantee of the lawful owner, acquire their rights, simply because there is nobody in existence having a right of action against them. Is this not a very roundabout way of stating that each of these persons has a perfect right to what he has?

It would be worth somebody's while to make a special study of, how the nominalist party among the old schoolmen came to be so dominant in England, that English and, to some extent, American thought are dominated by it to this day.

Is "right" nothing but a name? or, is it a reality?

They used to fight about whether love, hatred, thought, man, horse, cow, and all similar generalizations had any existence in themselves, or whether they existed only in connection with an individual man, beast or thing. The old schoolmen never came to an agreement, but the present world is pretty well agreed that there are realities outside of those which may be tested by the senses, but realities of a different kind.

"Right" belongs to this other class of realities, the ideal realities. They have no physical existence, but they may be approximately expressed. The right of own-

ership is expressed in the legal ability to loan, lease, mortgage, pledge the property in question, to grant easements and restrictions thereon, and in innumerable other ways which may not be enumerated. All of these transactions cut down the actual use of the property by the owner (his *dominium*), but none of them take away from his ownership (his *proprietas*). If I own two adjoining houses, one clear, the other with a mortgage against it, I am just as much the owner of the encumbered as of the clear house. My ownership of the one may not be as valuable as that of the other, but the quality thereof is the same. I may be legally divested of my title to either house in various ways, and of the title to the encumbered house I may, in addition, be divested by foreclosure, but while I conform to the terms of the mortgage, my title to the mortgaged house is as indefeasible as my title to the other. If illegally disseised of either or both properties, my "right of action" to recover possession is exactly the same in both cases. But if the author's contention was true, that the landlord, bailor, etc., may be called owner by the use of inaccurate or elliptical language, only, the above statements would be incorrect.

The right of ownership, however, is expressed above all (and this is a *sine qua non*) in the fact that the owner may legally transfer the title to the property (subject possibly to encumbrances, easements, restrictions, leases, estates for life, etc.), and that he is the only person who can do it legally; and it is further expressed in the fact that all of these encumbrances, restrictions, easements, etc., merge in the ownership, at the very moment when they come to an end. When a mortgage is satisfied, it enlarges the owner's right of disposition, but the owner's right only. The property enjoying an easement thereon does not acquire any further rights; if the easement is released, the mortgage may become better secured, but the right under it is in no way enlarged. The only person, whose right becomes enlarged, is the owner.

If the true definition of ownership was, the right of full possession and enjoyment and, when these have been lost unlawfully, a "right of action" to recover them, how could the above statements be true? Still, we believe, nobody will dispute them.

The criterion of ownership is the legal right to alienate the thing. Ownership, in contradistinction from all other rights in things, is elastic. It covers all right to dispose of and over the thing not forbidden by the law, by reason of public policy. But in its actual exercise, it may be much more restricted by reason of dispositions made by former or present owners thereof. But all such dispositions, all such rights in the thing created by successive owners are but *jura in re aliena;* they are strictly limited. they have no means of expanding or contracting automatically, and none of them includes a right to dispose of the thing itself (the title thereto). Suppose a man holds title to a property subject to a life estate; he will have no actual benefit from his ownership, and he will be able to sell for a small proportion, only, of the value of the property unencumbered. He may die before the life tenant and never obtain actual possession or enjoyment. Still, he is the owner, and upon his death the title will vest in his heirs or devisees.

Any considerable revival in the study of any branch of national history, has a tendency to create a form of romanticism. First comes a surprise that these men of old were really so good, so noble, so valiant, so gallant, so wise, so shrewd, so sharp, so well educated as the sources disclose them to have been. Next comes a doubt whether they were not really, in many respects at least, superior to us with all of our much vaunted civilization, culture, science and knowledge. With the enthusiasts follows a conviction, and not seldom a fanatical conviction, that they actually were our superiors. And, they may be right. Brian, C. J., may have been a man of a mind superior to that of any man now occupying a judgment seat. But that is not the ques-

tion. Conditions of life, conditions and qualities of men's minds, their ideas, beliefs, ways of doing business, etc., etc., are to-day entirely different from what they were in the days of Brian, C. J.

The study of the history of law we believe to be commendable in all lawyers and, to the writer at least, is a source of great interest and enjoyment, but if it shall develop in the student such admiration of the wisdom of old, that he considers it his duty to infuse it into the practical life of his own day, we are afraid that nothing but confusion and reaction will come thereof.

We do not suppose that our law, for centuries to come, if ever, will rid itself of the habit of expressing substantive law in the terms of remedial law. But we believe that an awakening to the danger of this habit is taking place. If and when it shall become generally recognized that the use of adjective terms for substantive rights is but an inaccurate use of expression, the greatest drawbacks connected with such use will have practically disappeared.

AXEL TEISEN.

Philadelphia, Pa.

MASTER AND SERVANT—DURATION OF EMPLOYMENT.

NATIONAL LIFE INS. CO. OF UNITED STATES OF AMERICA v. FERGUSON.

Supreme Court of Alabama. Oct. 14, 1915.

69 So. 823.

Where services are rendered under an offer to pay therefor at a stipulated sum per week or month, without specifying the duration of the employment, it may be terminated by either party at the end of any unit period.

The defendant offered plaintiff, then in Michigan, employment as shown by the following letter, dated August 13, 1913:

"If you want to come to work for us, we will give you $150 per month salary for several weeks work at Chicago, if necessary for this long, until such a time as Atlanta or some other point requires your services. It is understood that when you take a certain territory you are to receive a salary of $25 a week and 5 per cent on your premiums collected on the business you handle—the company to furnish an office and stenographer. You are also to keep yourself in readiness to do some special work adjacent to the point at which you are located. For this class of work you are to receive your traveling expenses in addition to the above salary. We are in hopes that Atlanta will be in shape for you to go to work there within a week or two. There is possibly a month's work at the present time handling bad claims throughout certain sections of the South which must be done by personal interview in addition to the above, if Atlanta does not materialize. In fact, we can keep you busy right along on this class of work, if we are delayed in getting the proper territory for you to work in.

"C. H. BOYER, Mgr., Casualty Dept."

Plaintiff accepted the offer, and went to work in Chicago on August 16, 1913, and worked (presumably) several weeks in and around Chicago, and then came to Birmingham, Ala., under the direction of Manager Boyer, and worked for defendant as traveling adjuster in the Birmingham district until his discharge, without cause, on February 7, 1914. Plaintiff declined to accept his discharge until February 16th, which he claimed as the termination of his employment by the month.

SOMERBILLE, J. [1] When services are rendered under an offer to pay for them at so much per week or month, without specifying the duration of the employment, the employment is terminable by either party at the end of any unit period; and the beginning of each new unit period necessarily postpones the right to terminate until the end of that period. Clark v. Ryan, 95 Ala. 406, 11 So. 22.

[2] The only question in this case is whether the plaintiff was working for the defendant by the month or by the week. If by the month, he was entitled to pay for nine days additional after his discharge on February 7th. If by the week, he was entitled to no pay after that date.

We think a fair construction of the epistolary offer under which plaintiff went to work for defendant is that he was to receive a salary of $150 a month only for work done in Chicago, and $25 a week and 5 per cent commissions for regular business done in any territory assigned to him. Nothing was said about the work of "traveling adjuster," and it seems reasonably clear that this service and its compensation of $35 a week, which was never paid monthly nor on any monthly basis, was a new contract between the parties, wherein $10 a week additional was allowed in

lieu of the commissions promised for procuring new business. Had plaintiff been working by the month for a salary of $150, he would have earned less than $35 a week, as a simple calculation will show. He would also have been entitled to compensation for ten days additional after his discharge, whereas he claims only for a week additional.

All the implications of law and fact arising from the meager evidence exhibited by the record lead to the conclusion that plaintiff's employment was by the week, rather than by the month, and it follows that his discharge on February 7th was not a violation of his legal rights.

Let the judgment be reversed, and a judgment here rendered for the defendant.

Reversed and rendered.

ANDERSON, C. J., and MAYFIELD and THOMAS, JJ., concur.

NOTE.—*Duration of Contract Where Hiring is by Week, Month or Year.*—Is a contract for personal services wholly indefinite as to duration, where the compensation is stated to be for units of time or is discharge lawful at any time other than at the end of a unit period? In Wood on Master and Servant, 272, it is said: "With us the rule (different from the English rule) is inflexible that a general or indefinite hiring is *prima facie* a hiring at will, and if the servant seeks to make it out a yearly hiring, the burden is upon him to establish it by proof. A hiring at so much a day, week or year, no time being specified, is an indefinite hiring and no presumption attaches that it was for a day even, but only at the fixed rate for whatever time the party may serve."

In Edwards v. R. Co., 121 N. C. 490, 28 S. E. 137, it was ruled, that where employment was by letter saying: "Your salary will be $1,800 a year," and the employe received $150 per month until he was discharged, it was said either could sever the relation at will. And where one was employed at a stated sum per month and was discharged on the 17th day, he was allowed to recover for 17 days at the rate per month. The Pokonet, 156 Fed. 241, 84 C. C. A. 49. This ruling was later expressly approved by this court in Warden v. Hinds, 163 Fed. 201, 90 C. C. A. 449, 25 L. R. A. (N. S.) 529.

While there is some conflict, this rule is quite generally approved. Harrington v. Brockman Com. Co., 107 Mo. App. 418, 81 S. W. 629; Kosloski v. Kelly, 122 Wis. 665, 100 N. W. 1037. But it was held by Wisconsin court that when wages are payable by the week, month or year, such circumstances may be taken into consideration in showing the period contracted for. In this case salary was fixed by the year and plaintiff had been working for defendant on a yearly salary for several years. "If from such evidence * * * the trial court finds a monthly or yearly hiring, corresponding to the rate of wages, the inference so drawn cannot be disturbed on appeal." Kellogg v. Ins. Co., 94 Wis. 554, 69 N. W. 362.

In Maynard v. Corset Co., 200 Mass. 1, 85 N. E. 877, it was said that: "Whether there is a contract for services for a definite period of time in any case depends upon all the attendant conditions surrounding the agreement, as well as upon its terms, when the latter are not specific and clear." Here the word "salary" used in the contract was considered because: "This word is perhaps more frequently applied to annual employment than to any other, and its use may import a factor of permanency."

Under a contract for $100 per month it was held as governed by Georgia statute to be at least a month, that subsequent to the first month it was indefinite as to duration and could be terminated at any time. Odom v. Bush, 125 Ga. 184, 53 S. E. 1013.

In Watson v. Gugino, 204 N. Y. 535, 98 N. E. 18, shows an employment at a weekly salary of $20.00. The court said: "The effect of a general contract of hiring, no time being specified, varies in different jurisdictions. In England, it is presumed to be for a year, regardless of the nature of the service, unless there is a custom relating to the subject and it appears that the contract was made with reference to the custom (citing English cases). In some states a stipulation as to the method of payment, such as weekly, monthly or yearly, is held to denote the period of service contracted for. (Totterson v. Mfg. Co., 106 Mass. 56; Mining Co. v. Harris, 24 Mich. 116; Beach v. Mullin, 34 N. J. L. 343.) In this state the rule is settled that unless a definite period of service is specified in the contract, the hiring is at will and the master has the right to discharge and the servant to leave at any time."

In Folz v. Fuller, 38 App. D. C. 139, there was held to be a hiring for a year, but the court said: "While the general rule undoubtedly is that a hiring at so much per year, without more, is an indefinite hiring, that rule gives way when the surrounding facts and circumstances show a different intention of the parties."

In Resener v. Watts, 73 W. Va. 342, 80 S. E. 839, the hiring was upon a monthly salary and expenses of a traveling man and commissions upon goods sold. His employer claimed employment was for a year and employe had no right to quit. The court said: "The authorities, while not wholly in accord generally state that an employment upon a weekly, monthly or annual salary, if no definite period is otherwise stated or proved for its continuance, is presumed to be a hiring at will." (A number of cases cited.)

We think, therefore, that the weight of authority is against the holding in the instant case.

C.

ITEMS OF PROFESSIONAL INTEREST.

BAR ASSOCIATION MEETINGS — WHEN AND WHERE TO BE HELD.

Connecticut—Hartford, January 31.
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Nebraska—Omaha, December 28 and 29.
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HUMOR OF THE LAW.

In the course of several events at Chicago, as narrated by Frank O. Lowden of that city, a member of the Republican National Committee, there was a wedding of great distinction. During the reception the bridegroom noticed a sad-looking guest standing apart.

"I say, old fellow," he joyously inquired, "what are you doing here all alone?"

"Nothing, was the reply; "simply avoiding the crush."

"You must come right out here and join the jubilee," the bridegroom urged.

"Have you kissed the bride?"

"I—er—I," stammered the guest, "no, not lately."—St. Louis Post-Dispatch.

Defendant (in a loud voice)—"Justice! Justice! I demand justice!"

Judge—"Silence! The defendant will please remember that he is in a courtroom."—Penn State Froth.

"Do you swear that what you tell shall be the truth, the whole truth, and nothing but the truth?" was put to a venerable white-haired ante-bellum negro arrested for intoxication.

"Jedge Briles, yo, Honah," was the quick answer, "you kin make hit a pow'ful lot easier fo' me ef yo'll leave out gin and chicken. 'Ceptin fo dat I guess I kin stick ter de truf."—The Co-operator.

Senator F. M. Brown of North Carolina relates that when Brown, a lawyer, started for his office one day he was followed to the door by his wife, who quietly asked:

"James, can't you let me have $5.00, I want to——"

"There you go again!" exclaimed the husband. "It is always money, money, money! When I am dead you will probably have to beg for it."

"Well," replied the wife, "I will be a whole lot better off than some poor women who have never had any practice."—St. Louis Post-Dispatch.

WEEKLY DIGEST

Weekly Digest of ALL the Important Opinions of ALL the State and Territorial Courts of Last Resort and of ALL the Federal Courts.

Copy of Opinion in any case referred to in this digest may be procured by sending 25 cents to us or to the West Pub. Co., St. Paul, Minn.

1. **Adjoining Landowners**—Encroachment.—An owner, who without right extended a part of his building over the building of the adjacent owner, must at the suit of the latter remove the encroachment.—Lewis v. Pingree Nat. Bank, Utah, 151 Pac. 558.

2. **Adoption**—Support of Child.—Under How. Ann. St. 1912, § 11640, an adopting parent is bound to support an adopted child, though the child be cared for by its natural parents.—Greenman v. Gillerman's Estate, Mich., 154 N. W. 82.

3. **Adverse Possession**—Color of Title.—A tax deed constitutes color of title, under which adverse possession may be set up, though the grantee failed to make the affidavit and give the notice required by statute.—S. R. Fowle & Son v. Warren, N. C., 86 S. E. 293.

4. **Arbitration and Award**—Enforcement.—Where a written agreement to arbitrate a dispute concerning title to land contained no description of the land, and there was no finding that aided the description, it could not be enforced.—Cutler v. Cutler, N. C., 86 S. E. 301.

5. **Attachment**—Property Subject to.—Where mortgage was given for a loan by H. to G., with agreement for G. to pay the money, on order to H., to one furnishing material to H., and G. refused to pay an order, there was an indebtedness of G. to H., which H.'s creditor, holding the order, could attach.—Holder Lumber Co. v. Scarborough, Cal. App., 151 Pac. 674.

6. **Bailment**—Negligence.—Bailee of barge, which capsized upon loading, held liable for rent while it remained in such condition loaded with bailee's goods, until returned, irrespective of negligence in causing capsize.—Cook v. Foreman Derrickson Veneer Co., N. C., 86 S. E. 289.

7. **Bankruptcy** — Contempt. — Bankrupt, not having means may not be punished by summary imprisonment for contempt for not paying over money as ordered, though he may have committed an offense under Bankr. Act, § 29.—In re McNaught, U. S. D. C., 225 Fed. 511.

8.——Evidence.—A deposit slip showing that the bank deposit was made as a trust fund held not material, in an action against another creditor of the bankrupt, to recover perferential payments.—Chisholm v. First Nat. Bank of Le Roy, Ill., 109 N. E. 657.

9.——Laches.—That the wife of a bankrupt has allowed three years to elapse since the adjudication of bankruptcy constitutes such laches as will preclude her from then contesting the allegations of insolvency in the petition upon which the adjudication was founded.—In re Gibbons, U. S. D. C., 225 Fed. 420.

10.——Preference.—A creditor, who has received a preferential payment, and who, during the hearings on the question of the adjudication of bankruptcy, offers to return it, has standing as a petitioning creditor, on depositing the payment with the clerk.—In re Murphy, U. S. D. C., 225 Fed. 392.

11.—Preference.—Where a bankrupt made voluntary payments voidable as preferences, the trustee might have his remedy against the persons receiving the money; but the court could not direct the bankrupt to turn over the money to the trustee.—In re Cunney, U. S. D. C., 225 Fed. 426.

12——Provable Claim.—Claim for liquidated damages for anticipatory breach of contract in consequence of bankruptcy held provable under Bankruptcy Act, § 63a(4), notwithstanding Form No. 31.—Board of Commerce of Ann Arbor, Mich., v. Security Trust Co., U. S. C. C. A., 225 Fed. 454.

13.——Summary Proceeding.—Where an adverse claim of a third person justifies a judgment in his favor, the trustee may not maintain summary proceedings; but where the claim is frivolous, he may maintain a summary proceeding.—Courtney v. Shea, U. S. C. C. A., 225 Fed. 358.

14.——Time.—(U. S. C. C. A.) Time for filing petition to review order fixing allowance to tr stee's attorney, under rule 38 for the Second circuit (150 Fed. 79 C. C. A. liv), held not extended by applying for a reduction of the allowance.—In re John M. Linck Const. Co., U. S. C. C. A., 225 Fed. 488.

15. **Banks and Banking**—Contract.—Where the persons contracting on behalf of a bank are directors thereof when the contract was made, a subsequent failure to elect directors will not invalidate the contract.—La Rue v. Bank of Columbus, Ky., 178 S. W. 1033.

16.——Pleadings.—Where a dishonored check sued on is attached to the petition and alleged to have been made by defendants, and purports to have been signed by an individual as cashier, the cashier's authority to make the check is sufficiently alleged.—Ellis v. Jones, Ga., 86 S. E. 317.

17.——Special Deposit.—In an action against a bank for interest on a special deposit, it is no defense that the deposit was made under a stipulation by the depositor with third persons to maintain same.—Madison Nat. Bank v. Gross, Neb., 154 N. W. 207.

18. **Bastards**—Descent and Distribution.—A petition, by children born of a union illicit at

its commencement, to compel an administratrix to account to them as heirs of deceased, was properly refused, in the absence of proof of marriage between their mother and deceased.—In re Fuller's Estate, Pa., 95 Atl. 382.

19. **Bills and Notes**—Attorney Fees.—Under Negotiable Instruments Act, § 14, notes blank as to amounts of attorney's fees in powers of attorney authorizing confession of judgment for face, with costs and attorney's fees, completed by payee, when about to take judgment thereon, by filling up for 10 per cent of face of notes, held not void for alteration.—Kramer v. Schnitzer, Ill., 109 N. E. 695.

20.——Payment.—Where a bank, on receiving the proceeds of new notes executed by defendant and made payable to its cashier, who discounted them with another bank, surrendered to defendant his old notes, of which the bank had demanded payment, defendant's indebtedness to the bank was discharged.—Smith v. Smith, Ky., 178 S. W. 1058.

21. **Brokers**—Commissions.—Where a landowner accepted services rendered by real estate brokers and consummated a trade procured by them, she cannot defeat commissions on the ground that the time limit of the contract had expired when the services were rendered.—Ewan v. Power, Ky., 178 S. W. 1092.

22. **Building and Loan Associations**—Set-Off.—Purchaser of cumulative bonds in investment company, after paying installments and borrowing on note and on the bonds is collateral, held not entitled to set off payments against the loan or the interest thereon, or to have balance of the claim declared a debt against the insolvent company.—Fell v. Securities Co. of North America, Del., 95 Atl. 346.

23. **Carriers of Goods**—Demurrage.—A carrier's sale of lumber shipped for freight and demurrage charges after due notice and demand, and in strict compliance with the statute relating to the sale of unclaimed freight, is not a conversion.—Horton v. Tonopah & Goldfield R. Co., U. S. D. C., 225 Fed. 406.

24.——Request by Shipper.—A carrier need comply only with such requests and instructions of the shipper as to where the stock shall be unloaded and fed while in transit as are reasonable.—Keat v. Chicago & N. W. Ry. Co., Neb., 154 N. W. 220.

25.——Contributory Negligence.—A child of 13, carried beyond his station by railroad, walking to destination and injured by the exposure, held not guilty of contributory negligence in not stopping at some house.—Moss v. Detroit & M. Ry. Co., Mich., 154 N. W. 140.

26.——Passenger Alighting.—A railroad company owes the duty of exercising reasonable care for the safety of a person who has alighted from a train and is waiting in the station with defendant's consent for the arrival of her husband.—Whitman v. Chicago Great Western Ry. Co., Iowa, 153 N. W. 1023.

27. **Commerce**—Workingmen's Compensation Act.—Under Rev. St. U. S. §§ 4283, 4289 (U. S. Comp. St. 1913, §§ 8021, 8027) the Workmen's Compensation Act held not to cover case of injury to seaman in intrastate commerce on Puget Sound, on plea that federal admiralty jurisdiction was unoccupied by Congress by a compensation act.—State v. Daggett, Wash., 151 Pac. 648.

28. **Constitutional Law**—Due Process of Law.—Pub. Acts 1901, No. 63, § 1, held not unconstitutional as depriving an execution purchaser at sheriff's sale before the passage of the act, but who has failed to take a deed from the sheriff within five years thereafter, of his property without due process of law.—Pike v. Halpin, Mich., 154 N. W. 148.

29.——Equal Protection.—L. O. L. § 2095, prohibiting advertising cure for venereal diseases, was not invalid as infringing the constitutional guarantee of equal protection of the laws.—State v. Hollinshead, Ore., 151 Pac. 710.

30.——Suspension of Sentence.—Laws 1909, c. 32, § 1 (Code 1915, § 5075), authorizing suspension of sentence, held not to encroach on the power of the executive, under Const. art. 5, § 6, to grant reprieves and pardons.—Ex parte Bates, N. M., 151 Pac. 698.

31. **Contracts**—Breach.—Contributors to fund raised by a board of commerce held not entitled to recover for breach of contract between the board and a manufacturing company, though made for their benefit.—Board of Commerce of Ann Arbor, Mich., v. Security Trust Co., U. S. C. C. A., 225 Fed. 454.

32.——Intoxication.—Intoxication of one contracting party held not ground for setting aside the contract if he understood the surrounding circumstances and knew the character and consequences of his act.—Carroll v. Polfus, Neb., 154 N. W. 213.

33. **Contribution** — Joint-Tortfeasors. — Where railroad company broke a street railway's trolley wire, and a traveler on the crossing was injured, held that, as the railroad company was guilty of negligence in breaking it, it was not entitled to contribution, on recovery by the traveler against both.—Owensboro City R Co. v. Louisville, H. & St. L. Ry. Co., Ky., 178 S. W. 1043.

34. **Corporations**—Action.—Where relations of officers of a corporation to the acts complained of, or to the adverse party, are antagonistic to the corporation, an action may be maintained or a defense made for the corporation by a stockholder, without demand upon such officers.—Burley Tobacco Co. v. Vest, Ky., 178 S. W. 1102.

35.——Bona Fide Purchaser.—On deposit of shares of a corporation by a judgment creditor of a stockholder in trust, to be surrendered to the corporation on issue of stock to same amount to the judgment creditor, objection to overissue of capital stock, if shares standing in debtor's name should belong to a bona fide purchaser, held overcome.—Parkhurst v. Almy, Mass., 109 N. E. 733.

36.——Interest.—Directors of corporation, receiving its moneys through unlawful appropriation of stock, held liable for interest on excess over what was due them.—Marvel v. Endicott, N. J. 95 Atl. 361.

37.——Officers.—The payment of debts is part of the ordinary business of a corporation, and in the absence of proof to the contrary it will be presumed to be within the scope of the authority of a general manager, whether he be acting as an officer de jure or de facto.—Mann v. W. A. Gordon Co., Ore., 151 Pac. 704.

38. **Conspiracy**—Unlawful Combination.—A combination of manufacturers to aid a manufacturer in resisting a strike by refusing to employ striking employes, held an unlawful combination to black list a striking employe, who could recover damages caused thereby.—Cornellier v. Haverhill Shoe Mfrs.' Ass'n Mass., 109 N. E. 643.

39. **Customs and Usages**—Written Contracts.—Evidence of a general custom of terra cotta companies to make detail drawings when furnishing material for contractors held not incompetent as varying a written contract in an action against a contractor who sought to recoup because the material did not conform to contract.—People v. Traves, Mich., 154 N. W. 120.

40. **Damages**—Jury.—In an action for the destruction of personalty by fire, where part of it was insured, but part not, it is improper to permit the jury to determine the entire value of the personalty, and from that deduct the amount of the insurance.—Morton v. Washington Light & Water Co., N. C., 86 S. E. 294.

41. **Death**—Eyewitnesses.—Where a person is killed through another's negligence, it will be presumed, in the absence of evidence to the contrary, that deceased was exercising reasonable care.—Sorensen v. Selden-Breck Const. Co., Neb., 154 N. W. 222.

42.——Res Judicata.—A judgment in the state court denying recovery for personal injuries which caused death held, under Rem. & Bal. Code Wash. §§ 183, 194, a bar to an action in the federal court by deceased's widow for his death; both actions being based on the same negligence.—Frescoln v. Puget Sound Traction, Light & Power Co., U. S. D. C., 225 Fed. 441.

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43. **Deeds**—Building Restriction.—A restriction against a building on the front three-fifths of a lot facing a side street held violated by a building facing a street running along the side of the lot, though used as a principal business street.—Turney v. Shriver, Ill., 109 N. E. 708.

44.——Undue Influence.—It is not necessary, to sustain a deed, that there should have been an absolute freedom from influence, the test being whether there was such influence as to take away the grantor's freedom of disposition by physical or moral force, or by fraud.—Akers v. Mead, Mich., 154 N. W. 9.

45. **Divorce**—Common Law. — When the American colonies and the states of the Union adopted the common law of England they did not adopt the ecclesiastical law pertaining to marriage and divorce, so that, in the absence of constitutional provision or express legislation, no American tribunal has jurisdiction to grant a divorce.—Cotter v. Cotter, U. S. C. C. A., 225 Fed. 471.

46. **Dower**—Liens.—As against heirs, distributees, and creditors other than a lien creditor, held, that a widow was entitled to have personalty applied pro rata on the lien debt with all others of its class, and to have the balance of such debt paid on the sale of the incumbered land, subject to her dower if sufficient to pay it.—Commercial Banking & Trust Co. v. Dudley, W. Va., 86 S. E. 307.

47. **Estoppel**—Abandonment.—Failure of city to assert rights to land covered by a highway held an abandonment by the municipal authorities and the public estopping them as against the plaintiff, who had held for 30 years by himself and grantors, and who had made improvements under permit from the city.—Remy v. City of Chicago, Ill., 109 N. E. 679.

48.——Notice.—Estoppel does not arise by payment of money as price of property, where payment is made with knowledge of the fact that the conveyance will carry title only to a part of the tract.—Central Pac. Ry. Co. v. Droge, Cal., 151 Pac. 663.

49.——Privity.—Where a husband conveyed land to his wife on condition that she support him, he and his heirs are estopped, the wife having conveyed the land to another, and the husband having quitclaimed to her grantee, to set up breach of the condition.—Demerse v. Mitchell, Mich., 154 N. W. 22.

50.——Privity.—Where the owners of land conveyed part thereof by general warranty to grantees whose title was subsequently declared invalid, and the grantees thereafter reconveyed the land to their grantors, the grantors are estopped from asserting that they did not have good title to the land conveyed.—Central Pennsylvania Lumber Co. v. Bristol, Pa., 95 Atl. 383.

51. **Evidence**—Opinion.—In an action by a motorist, run down by a street car, his wife, who was driving, cannot testify as to whether her husband apparently saw she could not control the machine; that calling for a conclusion of the witnesses.—Flannery v. Interurban Ry. Co., Iowa, 153 N. W. 1027.

52. **Executors and Administrators**—Estoppel. —Where, on the petition of the administrator, the county court orders funds paid over to him as such, neither he nor his sureties may thereafter deny that the funds were received in a fiduciary capacity, or the legality of his appointment.—Boundinot v. Locust, Okla., 151 Pac. 579.

53.——Presumption.—It will be presumed that a man of good standing and disinterested, appointed as a special administrator, will preserve an estate for all, and that he, rather than one of those entitled to the property under a will which was the subject of contest, should be appointed.—In re Ellenberger's Estate, Iowa, 153 N. W. 1036.

54.——Vested Interest.—The vested interest of a state's attorney in a fund in the hands of the clerk of court, he having a right to have his fees and commissions paid therefrom, passes on his death to his personal representative.—Galpin v. City of Chicago, Ill., 109 N. E. 713.

55. **Factors**—Conversion.—Mere failure of a factor to account, or mere sale of the goods by the railroad by which the factor shipped them, does not show a conversion by him, authorizing action for goods sold and delivered.—Hutchins v. Vinkemulder, Mich., 154 N. W. 80.

56. **Frauds, Statute of**—Interest in Land.—An oil and gas lease, giving to the lessee the right to explore lands and remove therefrom the oil and gas, is a contract for the transfer and sale of an interest in lands, and must be in writing.—Beckett-Iseman Oil Co. v. Backer, Ky., 178 S. W. 1084.

57. **Habeas Corpus**—Process of Law.—By whatever authority original restraint of applicant for habeas corpus was made, upon issuance of writ, party against whom it runs must bring him before the judge to justify present restraint.—Addis v. Applegate, Iowa, 154 N. W. 168.

58. **Highways**—Contributory Negligence.—A person who drove an automobile at night in a dark place on the highway so fast that he could not avoid an obstruction within the distance lighted by his lamps was guilty of contributory negligence.—Knoxville Ry. & Light Co. v. Vangilder, Tenn., 178 S. W. 1117.

59. **Husband and Wife**—Evidence.—In an action on a note executed by a married woman, plaintiff did not make out a prima facie case by producing the note, proving the signature, and showing amount due thereon, where he failed to show that consideration passed to the defendant.—Judd v. Judd, Mich., 154 N. W. 31.

60. **Indians**—Mistake of Law.—A father who was a Chickasaw Indian of less than one-half blood cannot cancel a deed to his son for land inherited in fee from his deceased daughter, but in which he believed he only had a life estate, on the ground of mistake of law.—Campbell v. Newman, Okla., 151 Pac. 602.

61.——Statutory Construction.—The proviso of Act Cong. April 26, 1906, does not apply where a full-blooded Indian died after the passage thereof, leaving all his property to his wife, leaving a grandchild, who was an enrolled Creek citizen, but leaving no parent or children.—Wilson v. Greer, Okla., 151 Pac. 629.

62. **Injunction**—Refusal of.—An injunction against the directors of a school corporation to restrain the teaching of the Catholic catechism will not issue, where the practice sought to be restrained has been abandoned in good faith.—Knowlton v. Baumhover, Iowa, 153 N. W. 1020.

63. **Insurance**—Avoidance of Policy.—Where an insured stock of goods was sold to the execution creditor, and thereafter, prior to the fire, repurchased by the execution defendant without having been removed from the store, held, that the policy was not avoided by the sheriff's sale.—Weisberger v. Western Reserve Ins. Co. of Cleveland, Ohio, Pa., Atl. 402.

64.——Burglary.—A postmaster held to have such an interest in government stamps, for which he was required to account, that he could recover on a burglary policy for their loss.—General Accident, Fire & Life Assur. Corporation v. Stratton, Ky., 178 S. W. 1060.

65.——Mingling of Property.—Mixing of lumber illegally cut with lumber owned by the insured, valued at more than the amount of the policy, in the absence of fraud or knowledge, held not to avoid the policy for failure of insured's sole and unconditional ownership of the property.—First Nat. Bank v. Aetna Ins. Co., Mich., 153 N. W. 1063.

66.——Waiver.—Where insured delivered a policy to the agent, requesting him to indorse permission to mortgage, and the agent returned it saying that he had fixed the matter, recovery cannot be defeated because permission was not indorsed on the policy.—German-American Ins. Co. of New York v. Lee, Okla., 151 Pac. 642.

67. **Landlord and Tenant**—Foreclosure.—The purchaser at foreclosure of a hotel leased by the previous owner for a term of years may, by expressly assuming the obligations imposed by the lease contract, subject himself to the same liability as if such obligations were in-

corporated in a new contract.—Valdes Hotel Co. v. Ferrell, Ga. App., 86 S. E. 333.

68. **Life Estates**—Accounting.—Where an executrix, who had a life estate in property, attempted to dispose of some of it to one who took with knowledge, those entitled to remainder will be granted an accounting, not only against the administrator of the executrix, but her grantee.—Benham v. Turkle, Iowa, 153 N. W. 1017.

69. **Master and Servant**—Negligence.—For death of a servant through negligent temporary covering by fellow servants of a hole made for work in progress and unfinished, the master, not negligent in not discovering how it was covered, was not liable at common law.—Johnson v. Cochrane Chemical Co., Mass., 109 N. E. 641.

70.——Proximate Cause.—Where a construction company's negligence in the keeping and use of coal oil is the proximate cause of injury to an employe not contributorily negligent, the company is liable.—Sorensen v. Selden-Breck Const. Co., 154 N. W. 222.

71.——Respondeat Superior. — Though the foreman in charge of a mine called away plaintiff's coservent, who was assisting him in lowering a mine car, the master was not liable, where plaintiff stopped the car in the proper place, and then stepped in front of it to place a block on the other side, for plaintiff selected his own place of work.—Riddle v. Wisconsin Steel Co., Ky., 178 S. W. 1064.

72.——Safe Working Place.—Where a mine owner had knowledge of dangerous conditions, or of failure of the mine foreman to safeguard the lives of employes, he cannot be excused for failing to remedy such conditions on the plea that he is not responsible for the negligence of the mine foreman.—McCollom v. Pennsylvania Coal Co., Pa., 95 Atl. 380.

73.——Safe Working Place.—Where an experienced miner is replacing old timbering in the mine with new, the doctrine that the master must furnish a safe place to work does not apply.—Kangas v. Cleveland-Cliffs Iron Co., Mich., 154 N. W. 41.

74.——Safe Working Place.—In an action for injuries in a collision between an engine and the car which plaintiff was moving, the defense of unsafe place was not tenable, since the injury was caused during the operation of the train.—Salo v. Martin, Mich., 154 N. W. 20.

75. **Mechanics Liens**—Material.—Where a prima facie showing that some of the material was used in a building is met by proof that the material was not used in the building, the lien will be denied, unless there is evidence showing with reasonable certainty the sum due for the material used in the building.—De Bolt v. Farmers' Exchange Bank, Okla., 151 Pac 686.

76. **Mines and Minerals**—Contract.—A firm agreement and a deed by copartners to a new partner, stipulating for the payment by the new partner "of the first money taken out of the ground," held to require the new partner to pay out of his share of the first money taken out of the ground.—Lesamis v. Green berg, U. S. C. C. A., 225 Fed. 449.

77.——Stipulation.—A stipulation for leaving pillars to support the surface in the event of a termination of the lease held to have reference exclusively to a determination prior to the removal of all the coal, so that the future mining operations could be conducted.—Miles v. New York, Susquehanna & Western Coal Co., Pa., 95 Atl. 397.

78. **Monopolies**—Facts Constituting.—That a carrier controls a small percentage of coal lands and transports coal, most of which comes from mines controlled by a company in turn controlled by it, does not constitute a monopoly of interstate commerce, where there is an honest dissociation of interests between coal owner and coal carrier, and the carrier owns no stock in companies selling coal beyond the state limits.—United States v. Lehigh Valley R. Co., U. S. D. C., 225 Fed. 399.

79. **Municipal Corporations**—Abutting Owner. An owner of property abutting on a street may not project his building into a street without being liable to another owner for damages sustained thereby, though Legislature or municipality, may authorize encroachments on public streets.—Lewis v. Pingree Nat. Bank, Utah, 151 Pac. 558.

80.——Charter.—That local acts creating board of poor commissioners and office of city physican were not designated as parts of, or amendments to, city charter, did not except them from amendment by the people.—Pryzbylowski v. Board of Poor Com'rs, Mich., 154 N. W. 117.

81.——Negligence.—It was not in itself negligence to cross a street diagonally, instead of on a crosswalk, on a dark night, when no street lights were burning.—Middleton v. City of Cedar Falls, Iowa, 153 N. W. 1040.

82.——Ordinance.—Where a city passed a track elevation ordinance with provision for construction of a subway at the intersection of a street, which ordinance was accepted by the railroad, the city acquired the subway as part of the street, and it was unnecessary in the first resolution for construction of a sewer in the street to describe the property within the railroad right of way or provide condemnation thereof.—City of Chicago v. Sullivan Machinery Co., Ill., 109 N. E. 696.

83.——Police Power.—Cities cannot, under the police power, determine the reasonableness of rates charged by public service corporations, or prescribe regulations relating to their facilities, service, and business.—York Water Co. v. City of York, Pa., 95 Atl. 396.

84. **Negligence**—Imputable Negligence.—The negligence of the driver of an automobile held not imputable to his wife, who was riding with him, so as to preclude her from recovering for her own injuries.—Knoxville Ry. & Light Co. v. Vangilder, Tenn., 178 S. W. 1117.

85. **Parent and Child**—Harboring Minor.—Where the father notified a person harboring a minor that he would claim wages at a sum named in the notice, the measure of damages recoverable was the reasonable value of the minor's service, not exceeding the amount named in the notice.—Wolf v. Vannoy, Neb., 154 N. W. 215.

86. **Patents**—Infringement.—A decision that a street flushing machine involved in a prior suit had not then been so adjusted and used as to infringe was not adjudication that the machine used by defendant was not an infringing machine or was incapable of being so adjusted as to infringe when in use.—Sanitary Street Flushing Mach. Co. v. City of Amsterdam, U. S. D. C., 225 Fed. 389.

87. **Principal and Agent**—False Representations.—Where a contract with a "sales solicitor" did not authorize him to make any representations as to quality or value of the land, the landowner was not liable to a purchaser for the solicitor's false representations as to the same.—Hodson v. Wells & Dickey Co., N. D., 154 N. W. 193.

88. **Principal and Surety**—Strict Construction.—A surety, who does not receive compensation or share in the benefits, is bound only to the exact terms of his undertaking, and will be discharged if there is any alteration.—Evatt v. Dulaney, Okla., 151 Pac. 607.

89. **Railroads**—Negligence.—Railroad, starting its freight train with only the usual and necessary noises connected therewith, held not liable for injury to plaintiff, whose horse was frightened, ran away, and threw her out.—Dotson v. Michigan Cent. R. Co., Mich., N. W. 1065.

90.——Process.—Nonresident railroad companies being suable in Georgia, and service being perfected on them by second originals, they are properly sued, notwithstanding they or some of them had no agent or railroad in the county where the accident occured and the resident defendant is sued.—Roy v. Georgia R. & Banking Co., Ga. App., 86 S. E. 328.

91.——Proximate Cause.—Though plaintiff, when awakened, found his head between the rods of his bed, the railroad company, whose car crashed through the fence in front of plain-

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tiff's residence, held not liable for the injuries sustained by plaintiff in extricating his head.—Louisville & N. R. Co. v. Chambers, Ky., 178 S. W. 1101.

92.——Traffic Regulations.—Order of Railroad Commission establishing a passenger route on lines of two railroads was valid, where they ran at right angles, and did not originate traffic in the same general territory.—Grand Rapids & I. Ry. Co. v. Michigan R. R. Commission, Mich., 154 N. W. 15.

93. **Sales**—Contract.—On the seller's breach of contract, the buyer's measure of damages is the difference between the contract price and the market price which the buyer would have to pay for similar goods, but it is immaterial that the buyer has not actually made purchases at such price.—Rockford Malleable Iron Works v. Tilden, Mich., 154 N. W. 35.

94.——Damages.—In action for the breach of warranty for machinery sold, the measure of damages is the difference between the value of the machinery as warranted and its actual value.—Kansas City Hay Press Co. v. Williams, Okla., 151 Pac. 570.

95.——Delivery.—In an action for lumber sold under contract excusing delay from accidents, stormy weather, and delay of the railroad in furnishing cars, held to excuse failure to deliver in the time stipulated.—Durden-Coleman Lumber Co. v. William H. Wood Lumber Co., Mass., 109 N. E. 648.

96.——Conditional Sale.—Conditional vendee held unable to deprive vendor of his property in the goods by an unauthorized removal from a state that recognized the contract as valid.—Fuller v. Webster, Del., 95 Atl. 335.

97.——Implied Warranty.—An implied warranty on an executory sale of personalty does not survive acceptance, and the purchaser must inspect and reject to avail himself.—Stearns Salt & Lumber Co. v. Dennis Lumber Co., Mich., 154 N. W. 91.

98. **Specific Performance** — Jurisdiction. — Where heirs of testatrix made a contract of settlement, the circuit court could require specific performance thereof without interfering with jurisdiction of probate court.—Dunham v. Slaughter, Ill., 109 N. E. 673.

99. **Street Railroads**—Contributory Negligence.—In an action for damages due to an injury to plaintiff's wife, caused by a street car striking the sidewalk upon which she was walking, it was error to submit the question of her contributory negligence; no issue having been made on the subject.—Pruner v. Detroit United Ry., Mich., 154 N. W. 4.

100.——Franchise.—Though a street car company's franchise has expired, yet where it is continuing to operate its cars by virtue of an extension, it is bound by a prior ordinance limiting the speed of cars.—Flannery v. Interurban Ry. Co., Iowa, 153 N. W. 1027.

101.——Negligence.—Though a contract authorized removal of street railway company's trolley wire, if it sagged where the street railway crossed its tracks, the railroad company was not justified in running wrecking train against it where it sagged, and breaking it.—Owensboro City R. Co. v. Louisville, H. & St. L. Ry. Co., Ky., 178 S. W. 1043.

102. **Sunday** — Picture Shows.—Defendant, running a moving picture show on Sunday, in assumed violation of Comp. Laws 1897, § 5912, could only be proceeded against thereunder, and not under § 11334 et seq., providing summary arrest for unlawful assembly and refusal to disperse.—People v. Dixon, Mich., 154 N. W. 1.

103. **Taxation**—Equity.—A taxpayer failing to make fair disclosure must, to obtain relief in equity against taxation on omitted property, disclose all his property subject to taxation and show that he has paid or is willing to pay all taxes.—City of Georgetown v. Graves' Adm'r, Ky., 178 S. W. 1035.

104.——Inheritance Tax. — A testamentary dispensation by a legatee under a power in the will of property situated in another state, the legal title to which is held by a trustee resident in such state, held not subject to a succession tax, under St. 1909, c. 527, § 8.—Walker v. Mansfield, Mass., 109 N. E. 647.

105. **Trade-Marks and Trade-Names** — Descriptive Words.—The registered trade-mark "Thermogène," as applied to complainant's cotton wadding, so prepared as to act as a counter-irritant, held a word of precise description which could not be registered as a trade-mark.—Thermogène Co. v. Thermozine Co., U. S. D. C., 225 Fed. 446.

106. **Vendor and Purchaser** — Constructive Notice.—A purchaser is charged with constructive notice of whatever appears in his claim of title, and if there is sufficient to put a prudent man on inquiry, he is charged with actual notice of all the facts which he would have discovered by inquiry.—Muller v. McCann, Okla., 151 Pac. 621.

107.——Recission.—A purchaser who has made a payment under a contract to buy land, but has failed to make further payments thereunder, may, when the contract has been mutually rescinded, recover the money so paid.—Hurley v. Anicker, Okla., 151 Pac. 593.

108.——Tender.—Where a contract for sale of land provides for payment of price upon approval of abstract and delivery of deed, either party must tender performance in order to put the other in default.—Tucker v. Thraves, Okla., 151 Pac. 598.

109. **Waters and Water Courses** — Remote Damages.—In an action for damages from water backed by a dam, becoming stagnant, held, that items of damages due to croppers becoming sick and moving away were too remote and speculative to authorize recovery of value of crops alleged to have been thus lost.—Central Georgia Power Co. v. Parker, Ga., 86 S. E. 324.

110.——Riparian Owner.—One of two opposite riparian owners cannot build a dam to the middle of the stream and divert half the water through a flume, although he may return it into the stream before it leaves his land.—Blue Ridge Interurban Ry. Co. v. Hendersonville Light & Power Co., N. C., 86 S. E. 296.

111. **Wills**—Bequest.—A wife, to whom was bequeathed the income from trust of personal estate, with power to the trustee to use the principal for the wife's benefit, held not absolutely entitled to the trust property.—Stephens v. Stephens, Ky., 178 S. W. 1066.

112——Burden of Proof.—A beneficiary who sustained a confidential and fiduciary relationship towards the testatrix has the burden of showing by clear and convincing proof that no undue influence was exercised.—O'Day v. Crabb, Ill., 109 N. E. 724.

113.——Eccentricity. — Where testator was capable of managing a large estate, the fact that he was eccentric and somewhat degenerate in his tastes is no ground for an issue devisavit vel non on the question of mental capacity.—In re Smith's Estate, Pa., 95 Atl. 338.

114.——Illegal Accumulations. — Illegal accumulations created by a will are distributable under the intestate law, where there are no persons under the provisions of the will who are capable of taking same.—In re Sternbergh's Estate, Pa., Atl. 404.

115.——Lapsed Legacies. — Lapsed legacies will be disposed of as part of the residuary estate, unless the testator has clearly excluded such lapsed legacies from the operation of the residuary clause, in which case they go to his heir at law as intestate property.—Green v. Old People's Home of Chicago. Ill., 109 N. E. 701.

116.——Trust.—Under a will bequeathing property to testator's widow in trust, and providing that she should give no bond, held error to require her to give security for the performance of the trust.—In re Kelley's Estate, Pa., 95 Atl. 401.

117.——Undue Influence.—That a mother regarded unfavorably her daughters, excluded from her husband's bounty, and desired that result, communicating the desire to testator, does not show undue influence.—Zinkula v. Zinkula, Iowa, 154 N. W. 158.